Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Teamsters Canada Rail Conference,

complainant,

and

Canadian National Railway Company,

respondent.

Board File: 27776-C
Neutral Citation: 2011 CIRB **572**
March 15, 2011

The Canada Industrial Relations Board (the Board), composed of Ms. Elizabeth MacPherson, Chairperson, and Messrs. Patrick J. Heinke and Daniel Charbonneau, Members, has considered the above-noted complaint.

Having reviewed the written submissions of the parties, the Board is of the opinion that this matter can be determined without an oral hearing and exercises its discretion pursuant to section 16.1 of the *Canada Labour Code* (*Part I Industrial Relations*) (the *Code*) to decide the matter without holding an oral hearing.

I–Nature of the Complaint

[1] On October 14, 2009, Teamsters Canada Rail Conference (TCRC or the union) filed a complaint pursuant to sections 50 and 97(1)(*a*) of the *Code*, alleging that the Canadian National Railway Company (CN or the employer) had breached its duty to bargain in good faith by pre-emptively training replacement workers on the job and having them perform bargaining unit work

as a training tool. The union further alleges that these actions interfered with the trade union and undermined its representational capacity. It asked that the Board prohibit the continued training of replacement workers by CN.

II–Background

[2] At the time that the TCRC's application was filed in 2009, the parties were engaged in collective bargaining for the renewal of collective agreements applicable to the locomotive engineers (LE) bargaining unit. The collective agreements had expired on December 31, 2008 and after a period of direct bargaining, the employer filed a notice of dispute with the Minister of Labour on or about June 15, 2009. At the time that this unfair labour practice complaint was filed, the parties had exhausted the statutory conciliation process and were in the 21-day "cooling off" period that precedes the acquisition of the legal right to strike or lockout. The union initiated strike action on November 28, 2009, but the parties soon reached agreement to submit unresolved issues related to wages and benefits to final and binding arbitration. In view of this development, the Board conducted a case management teleconference (CMT) on December 9, 2009, during which it canvassed whether, given the settlement, there was any labour relations purpose to be served by proceeding with the complaint.

[3] While CN argued that the issues raised in the complaint were now moot, the TCRC argued that the parties were still in bargaining for the conductors, trainmen and yardmen (CTY) bargaining unit and suggested that the LE complaint was therefore still relevant and should be heard and decided as a test case. By letter dated December 9, 2009, the Board advised the parties that it was of the view that there was a labour relations purpose to be served by the determination of the complaint. The parties were asked to endeavour to reach an agreed statement of facts.

[4] A hearing of the complaint was scheduled for June 2-4, 2010, but was adjourned at the request of the parties. The matter was rescheduled for a hearing on October 4-6, 2010, but was once again adjourned at the parties' request, as they were engaged in bargaining with respect to the CTY unit. A settlement of the CTY dispute was ultimately reached and ratified by the bargaining unit members in November 2010.

[5] The LE collective agreement expires December 31, 2011 and the CTY collective agreement expires July 22, 2013.

[6] At the time of the second adjournment, the parties had been instructed to provide the Board with a status report on their efforts to develop an agreed statement of facts by January 6, 2011. In view of the settlement of the CTY collective bargaining dispute and the absence of the requested status report, the Board wrote to the parties on January 12, 2011, directing them to show cause why the complaint should not be deemed to be withdrawn pursuant to section 29(2) of the *Canada Industrial Relations Board Regulations, 2001* (the *Regulations*).

III–Positions of the Parties

A–The Complainant

[7] The union argues that it considers the issue raised in the complaint to be a live one that is relevant to the ongoing relationship between the parties. It suggests that it would serve both parties well if the issue was resolved prior to the next round of bargaining. The union suggests that it is seeking the Board's direction on these issues because of the difficulties it experienced with its members during the bargaining process, when CN had managers operating trains.

[8] In the alternative, the union submits that, if the Board finds that the complaint is moot, it should exercise its discretion under section 15.1 of the *Code* to issue a declaratory opinion as to the respective rights of the parties with respect to the training of management and other employees in anticipation of a strike.

[9] The union concedes that, in general, there must be a real difference between the parties before a labour relations board or arbitrator will proceed to determine a matter. However, it suggests that, since the parties to a collective bargaining relationship have a continual course of dealings with each other, it can be appropriate for a third party to exercise its jurisdiction to determine a dispute even when the determination may have no immediate consequences for either party. The union points out

that, even when there is no longer a live controversy between the parties, the courts retain a discretion to hear an academic matter in certain circumstances.

[10] The TCRC submits that the employer's training of management and other employees to perform bargaining unit work in the event of strike violates the duty to bargain in good faith. It suggests that a determination of the extent of the employer's right to so train replacement workers is required to ensure the union's ability to bargain effectively with the employer in the future. The union submits that this issue is a continuing one and that a valuable labour relations purpose would be served by determining the matter. In support of its contention, the union refers to the Board's decision in *Atomic Energy of Canada Ltd.*, 2001 CIRB 110, in which the Board said:

> [19] ... The purposes of the statute that "sound labour-management relations" be supported requires that ongoing impediments to the mutual endeavours of the parties, once properly brought before the Board should be addressed. Because of the continuing nature of the collective agreement relationship, where such consideration is initiated in accordance with the legislation and its continuance will meet the objectives of the *Code* it is not appropriate that consideration of a matter initiated in a timely way should be abandoned by the Board as moot, when it continues to be of importance to the relationship of the parties.
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> [21] In this respect, it is also of importance to be aware that the notion of mootness, grounded as it is in common law concepts and responsive to notions of the role and functions of common law courts, must be applied with care in the context of the administration of a statute. The issue for a statutory tribunal such as the Canada Industrial Relations Board must always be what the statute intends, and matters must be considered consistently with the statutory intent rather than from the perspective of a *lis inter partes* before a court. The nature of the employer/employee relationship governed by the *Code* is not an occasional and adversarial one, but a continuing and harmonious process wherein the common well-being is promoted over time through free collective bargaining and the constructive settlement of disputes. Taken from this perspective, it appears to the Board that the statutory purposes would be better served in the present circumstances if it is recognized that the dispute is viewed by the Board as of a continuing nature and not one of a short and defined duration, and if Board intervention is viewed as a necessary support to the parties to allow a better understanding of their obligations, both during the renegotiation of a collective agreement and during its implementation.

B–The Respondent

[11] The employer denies that it has violated the *Code* and it states that it has a long-standing business practice of training managers to be locomotive engineers, to ensure that they fully understand the positions that they supervise and so that CN is prepared for any unanticipated event requiring additional locomotive engineers. The employer states that it has the right to make

contingency plans as well as the right to use replacement workers during a legal work stoppage, as long as the use of such workers does not undermine the union's representational capacity.

[12] The employer submits that there are no longer any collective bargaining disputes between the parties with respect to either the LE or CTY bargaining units and therefore that the issue raised in the complaint is moot. As there is no longer a live controversy between the parties, CN suggests that the Board should dismiss the complaint.

IV–Analysis and Decision

A–Mootness

[13] In *Westcan Bulk Transport Ltd.* (1994), 95 di 169 (CLRB no. 1090), the Board held that its obligation to "hear and determine" complaints does not require it "to hear the merits of complaints that are moot and for which a determination would have no practical effect on the parties' rights."

[14] In *Borowski* v. *Canada (Attorney General)*, 57 D.L.R. (4th) 231, the Supreme Court of Canada stated:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. **If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision.** Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. ...
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> The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Secondly, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. ...
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> (page 239, emphasis added)

[15] In *Atomic Energy of Canada Ltd., supra*, the Board observed that the notion of mootness, as developed in the context of the proceedings of common law courts, must be applied with care in the context of proceedings before administrative tribunals. The Board went on to suggest that it should exercise its discretion to hear otherwise moot applications and complaints in a manner that supports and promotes the objectives of the *Code*, namely to encourage constructive and harmonious labour management relations.

[16] In the present case, it is evident that the circumstance that gave rise to the complaint, namely the training of managers to allegedly act as replacement workers in the event of a strike by the LE and/or CTY bargaining unit, no longer pertains, and thus the issue is academic. Therefore, the question for the Board is whether it should exercise its discretion to decide the merits of the complaint, despite the absence of a current controversy.

[17] Generally, it is the Board's policy not to issue retroactive or academic declarations. The Board often dismisses applications for a declaration of illegal strike or lockout on the basis that the remedies sought become academic once the employees return to work (see, for example, *Purolator Courier Ltd.* (1981), 45 di 300 (CLRB no. 344)). The policy rationale for this approach was explained in *Westnav Container Services Ltd.*, 2000 CIRB 55:

> [19] The labour relations considerations that underlie a refusal to issue an order are explained in *Acoustical Association Ontario et al.*, [1975] OLRB July Rep. 539, and still remain appropriate guidelines for this Board:
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> > Given the function to be performed by the declaration, the Board has been reluctant to grant a declaration where a strike has been settled before the hearing of the application. The reasons for this approach are fully explained in both *Beatty Bros.* (1965), 66 CLLC para. 16,049 and *National Refractories* (1963), 63 CLLC para. 16,276. The general thrust of these reasons is that, once the strike has disappeared, then, as a general rule, no useful purpose can be served by a determination of the legality of the activity. In other words, the declaration has been regarded as a procedure for preventing the continuation of strikes, and not as a procedure for a retrospective assessment of the legal position of one of the bargaining parties. To take this latter approach would create the danger that intervention by the Board might upset the settlement already reached. It must be recognized, moreover, that labour relations remedies should be applied selectively. If the Board were to grant the declaration as a general rule in cases where the strike has been settled, there is the very real possibility that the remedy will be far less effective in those cases where the strike is continuing. Over-usage is likely to debase the remedy, so that it will not be taken seriously in those cases where it is most needed. The Board's reluctance to grant the remedy, moreover, now serves as an incentive to end what might be an illegal strike. Once unions and employees receive notice of the application of the declaration, they know that, if there is an immediate return

> to work, there is a substantial likelihood that there will be no further intervention by the Board. Certainly, from an industrial relations perspective, this is a very desirable result.
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> (pages 541–542)

> [20] Therefore, in deciding whether or not to issue an order, the Board will take into consideration its role to promote the constructive settlement of disputes, as described in the Preamble to the *Code*. In this respect, it will support sound labour relations rather than take a punitive stance. The Board agrees with the findings in the previously stated cases that where unlawful activities have ceased prior to the Board's intervention, no useful labour relations purpose is served by retroactively issuing an unnecessary cease and desist order.

[18] In *Atomic Energy of Canada Ltd.*, *supra*, the issue was whether, in the context of negotiations for the renewal of a collective agreement, the union was entitled to information regarding salary increases that the employer had unilaterally given to certain employees in the bargaining unit. The employer had refused to provide the requested information, contending that it was confidential and protected by the *Access to Information Act*, R.S.C. 1985, c. A-1 and the *Privacy Act*, R.S.C. 1985, c. P-21 and that the union could obtain the information it sought directly from the employees affected. By the time that the complaint came before the Board for determination, the parties had settled their collective bargaining dispute and the employer argued that the issue was moot. The union argued that the disclosure of information was required for the purposes of bargaining in good faith, to allow for the proper administration of the collective agreement and to ensure its ability to bargain with this employer in the future. The union submitted that the issue was not past and resolved, but rather was a continuing one, in that the relationship between the union and the employer is ongoing and the matter at hand was relevant to that relationship.

[19] In determining that the issue was not moot, the Board observed that, not only would the whole process of bargaining envisaged by the legislation be frustrated if the information essential to informed and intelligent discussion and bargaining were not forthcoming, but the essential representational capacity of the bargaining agent could be impaired. The Board held that the continuing failure to disclose such clearly relevant information was a violation of section 50(*a*) of the *Code*, even after the conclusion of a new collective agreement.

[20] In this case, the union suggests that a decision regarding its complaint is necessary to guide the parties' behaviour in future rounds of collective bargaining. Conversely, the employer has indicated

that the issue is moot and requested that the Board dismiss the complaint. Where there is such a fundamental difference between the parties as to the utility of a decision based on a circumstance that no longer exists, the Board should be very cautious in assessing the labour relations purpose that would be served by proceeding with such a determination. More harm than good could well be done to the interests of labour management relations by a decision that has no practical effect or present-day relevance.

[21] After carefully considering the positions of both parties, the Board is of the opinion that rendering a decision in the current case would not support and promote the objectives of the *Code*, and could well do more harm than good to the interests of constructive labour management relations. Accordingly, the Board determines that the issue raised by the complaint is moot and declines to exercise its discretion to decide the complaint.

B–Application for a Declaratory Opinion

[22] The complainant also requested that, if the Board declined to decide its complaint, it issue a declaratory opinion pursuant to section 15.1(2) of the *Code*. This provision was included in the *Code* in 1999 and reads as follows:

> 15.1(2) The Board, on application by an employer or a trade union, may give declaratory opinions.

[23] The Board's approach to such applications was summarized in *TELUS Advanced Communications, a Division of TELUS Communications Inc.*, 2008 CIRB 415 :

> [2] In *Ledcor Industries Limited*, 2003 CIRB 216, the Board indicated that it would be very cautious in deciding whether or not to issue a declaratory opinion. The Board set out criteria for the exercise of its discretion under subsection 15.1(2), namely that:
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> (1) there is a valid labour relations purpose for the entire community;
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> (2) the benefit outweighs any mischief; and
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> (3) there is a solid factual background.
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> [3] Historically, requests for information similar to that at issue in this matter have come before this and other labour relations boards in the context of unfair labour practice complaints, and the union has indicated its willingness to place the issue before the Board in that manner, if necessary. However, the

> Board sees its role as one of endeavouring to assist the parties in establishing and maintaining constructive labour relations. To this end, the Board would prefer to deal with issues that have been jointly identified by the parties as an impediment to their relationship in a non-adversarial manner, rather than in the context of an after-the-fact complaint over unilateral action by either party that has inflicted further damage on the relationship. The Board will therefore be more inclined to use its powers under section 15.1(2) in cases involving a joint request by the parties for a declaratory opinion.

[24] In the instant case, the Board is not persuaded that the circumstances of this case merit a declaratory opinion. Although not a statutory requirement, the parties are not in agreement that an opinion be provided. As the circumstances of the case are unique to these parties, a decision would provide no instructional or precedential value for the labour relations community as a whole. Furthermore, the Board has concerns that even a declaratory opinion could negatively impact the parties' ongoing labour management relationship.

[25] Accordingly, the Board dismisses the complaint and the application for a declaratory opinion.

[26] This is a unanimous decision of the Board.

Elizabeth MacPherson
Chairperson

Patrick J. Heinke
Member

Daniel Charbonneau
Member